United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

74-1489

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

v.

VIRACHAI SANGUANDIKUL,

Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION RENDERED IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Appellant's Brief

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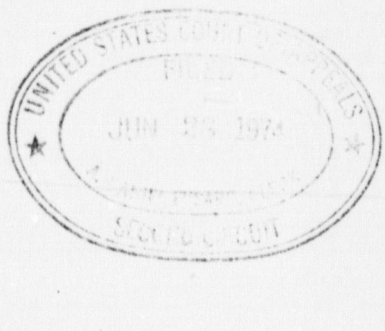

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

-against-

VIRACHAI SANGUANDIKUL,

Defendant-Appellant.

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APPELLANT'S BRIEF

Statement

The appellant, Virachai Sanguandikul, appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York, convicting him after a trial before Honorable Arnold Bauman and a jury, of the crimes of conspiring to and substantively violating Title 21, United States Code, Sections 812, 841(a)(1) and 841 (b)(1)(A).

Introduction

The appellant and another[1] were named in a two-count indictment alleging the commission of the crimes heretofore set forth and convicted as charged.

Sanguandikul was thereafter sentenced to concurrent ten (10) year terms of imprisonment which he is presently serving. He was also placed upon Special Parole for a period of three (3) years to commence upon the

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1. The co-defendant, Kan Lang Ng, was severed at the outset of the trial.

expiration of the aforesaid confinement.

The appellant was initially represented in the District Court by retained counsel, then in seriatim by Benjamin Golub and William K. Madden, each assigned by the Court.

Theodore Krieger has been appointed by this Court to prosecute the instant appeal.

Statement of Facts

The facts as adduced by the Government can be synthesized in the following narration.

Dennis Walczewski, a forensic chemist employed by the Drug Enforcement Administration, testified as to the chemical composition of three plastic envelopes containing 1360.84 grams of 95 % pure heroin hydrochloride.

Eugene Barrigan, an assistant United States Attorney, testified as to the facts and circumstances surrounding an interview that he had with the appellant on August 7, 1973.[2] Mr. Barrigan recounted that the appellant had told him that he had obtained the contraband from "Sam", whom he had known for some few weeks but did not know his place of residence. He further related that the appellant stated that he was to receive $1,500.00 for making the delivery.

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2. A pre-trial motion to suppress the statement predicated upon a claimed inability of the appellant to understand English was made and denied.

Sante A. Bario, a special agent of the Drug Enforcement Administration, testified that on August 6, 1973, while working in an undercover capacity, he met the co-defendant Kan Lang Ng,[3] at Grand and Clinton Streets in the Borough of Manhattan. The agent thereupon agreed to purchase three (3) pounds of white rock heroin at $18,000.00 per pound with the delivery to be made at 7:00 o'clock that evening.

At the agreed upon time Kan Lang Ng entered Agent Barrios' car, at which time the latter activated a Kel transmitter and recorded the ensuing conversation. Thereafter the appellant entered the agent's automobile and the former requested that he be driven to his parked car at Essex and Houston streets where the contraband was located. The agent refused to do so.

Thereafter the appellant requested a check of the money and the agent showed him the same, whereupon the appellant "flipped" through it and departed.

The appellant subsequently returned, driving a yellow Camaro, and parked in back of Agent Barios' car.

Kan Lang Ng, then left Agent Barios' car, received a brown grocery paper bag from the Camaro, returned, and the appellant remained outside and looked into the agent's vehicle.

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3. On October 3, 1973, a bench warrant was issued for his arrest, having forfeited a twenty-five ($25,000.00) thousand dollar personal recognizance bond.

The agent thereupon inspected the contents of the bag, agreed to pay the $54,000.00, and signalled his fellow agents who thereupon arrested the participants.

Joseph P. Salvemini and Frederick R. Smith, special agents of the Drug Enforcement Administration, testified as to their observations while conducting surveillance of the aforesaid events.

The tape recordings of the joint and several conversations between Agent Bario, Ken Lang Ng and the appellant were played and admitted into evidence.

The foregoing, constituting the Government's direct case, withstood the appellant's motion for a directed judgment of acquittal.

The appellant thereupon appearing as the sole witness on his behalf testified as follows:

That some two weeks prior to his arrest, he met "Sam", a fellow oriental who in turn introduced him to Kan Lang Ng, the co-defendant. Thereafter on August 6, 1973, "Sam" brought Kan Lang Ng to the appellant's hotel room where for some 10 or 20 minutes they spoke Chinese. Ng then left, and at 6:00 P. M. telephoned "Sam" who was asleep in the appellant's apartment. When "Sam" awoke the appellant told him that Ng had telephoned and wanted to meet him at Clinton Street.

Thereafter "Sam" made a telephone call and gave the appellant $10.00 to get Ng. The appellant then took a taxi to Clinton Street, saw Ng and told him to meet "Sam" at Essex Street. Ng stated that he had a friend waiting and introduced Bario to the appellant. Ng then told him to

return to "Sam" and to inform him that "this guy has the money." (S.M. 185).*

The appellant stated that he wanted to see it, but at no time was there any mention of heroin. He thereafter took a taxi to "Sam" and both returned in the appellant's car. Thereafter Ng removed the contraband from the car and the appellant remained on the passenger side when he was arrested.

The appellant stated that he had never before sold heroin and that his initial awareness of the contents of the paper bag was subsequent to his arrest. That in fact he was but doing a friend a favor, for which he was to receive $70.00 to repair his car.

On rebuttal the Government called Lloyd E. Young, an assistant dean of student affairs at Essex County College, Newark, New Jersey through whom a transcript of the appellant's academic records were introduced, attesting that all the courses, save one, were taught in English.

Summations were given and the Court thereupon charged the jury which began its deliberations at 2:00 P. M. on January 31, 1974.

At 6:35 P. M. it apprised the Court that it was unable to reach a verdict, and was thereupon excused for the night and told to report at 9:30 o'clock on the following morning.

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* The prefix "S.M." refers to the Stenographer's Minutes of the trial on file with the Court.

At that time the following took place in the robing room:

" THE COURT: My clerk tells me last night coming down in the elevator juror No. 2 indicated if he could ask him a question and the clerk indicated he could not, and Juror No. 2 said he wanted to discuss it and he would write me a note this morning. I just received the following note:

' Your Honor, I request your permission to be excused from the jury on the ground any action would be of a prejudice to the defendant. Also on the ground that my present view of the case is of bias feeling and extreme doubt. I hope your Honor will grant me this wish.'

It is signed Juror No. 2.

Juror No. 2, I think that is the best way of describing him, since I don't know his name, is the person who appears to be Asian, Mr. Lai, or something.

Well, I really feel I have no intention of excusing Mr. Lai at this point unless you both indicate that you want him excused and will consent to proceed with a jury of eleven. Other than that we will continue.

MR. MURPHY: I don't object to eleven.

MR. GOLUB: At this time I would like to move for a mistrial.

THE COURT: Denied.

MR. GOLUB: I will consent to the removal of the juror.

THE COURT: Do I understand that you consent to continue the deliberations with eleven? Now that I denied your motion for a mistrial?

MR. GOLUB: He had a conversation with your court clerk?

THE COURT: On the way out.

THE CLERK: Yes, your Honor.

MR. GOLUB: Last night.

THE COURT: As the juror was leaving the court the clerk was leaving.

MR. GOLUB: Mr. Murphy wasn't present nor I yesterday when the jury walked out. Was Mr. Lai present?

MR. MURPHY: I think he was. It makes no difference to you.

MR. GOLUB: I have absolutely no opinion on it, your Honor.

THE COURT: I invite you to comment in you wish. Will you agree that he be excused and that the jury continue?

MR. GOLUB: May I see the note?

THE COURT: You may see it.

MR. GOLUB: Thank you.

(Handed to counsel.)

THE COURT: That will be marked as a court exhibit.

(Note marked as Court Exhibit 2.)

MR. GOLUB: In light of the fact that you denied my motion for a mistrial, I will consent at this time that Juror No. 2 be excused and that the deliberations continue without Juror No. 2 being present.

THE COURT: All right. Would you explain that to your client, please, because I want him to consent to this on the record.

(Pause)

MR. GOLUB: My client asks to know whether or not the other jurors in the juryroom saw the note.

THE COURT: I would think not. I don't know. I am certain they would not but I have no knowledge. That isn't the way notes are sent. They are not generally circulated among the people.

(Pause)

(Defendant and interpreter present in robing room.)

THE COURT: Mr. Sanguandikul, has your lawyer told you that Juror No. 2 wishes to be excused from further service in this case?

THE DEFENDANT: (Through the interpreter) Yes.

THE COURT: Do you understand that you are entitled to have your case considered and decided by a jury of twelve?

THE DEFENDANT: Yes, sir.

THE COURT: Have you consulted with your lawyer and do you now agree that the case may continue and that a jury of eleven may decide your case if I excuse Juror No. 2?

THE DEFENDANT: That is okay.

THE COURT: Do you now consent then that I excuse Juror No. 2?

THE DEFENDANT. That is correct.

THE COURT: All right. Bring the jury in, please.

(In open court, jury present, at 10:10 a.m.)

THE COURT: Good morning, ladies and gentlemen.

Mr. Lai, both sides have consented that you may be excused from further service on this jury and the jury will continue its deliberations with eleven people on the jury.

You are excused and you may leave the box now."
(S.M. 276-80)

The Court thereupon gave its version of an Allen charge, as to which exception was taken, and the remaining jurors resumed their deliberations. A verdict of guilty as to both counts was returned.

Prior to sentence the appellant sought and received other assigned counsel. A motion pursuant to Rule 29 (c) of the Federal Rules of Criminal Procedure to set aside the verdict was then made predicated upon the claim that the appellant did not knowingly and voluntarily waive his right to a twelve-man jury. The thrust of the application was that the appellant, a Thai, did not in seriatim understand English, the American legal process, was misled by the interpreter, was inadequately served by his trial attorney, and that there was a failure to comply with Rule 23 (b) of the Federal Rules of Criminal Procedure in that the consent to be tried by an eleven-man jury was not in writing.

The trial court denied the motion holding at length that the appellant did understand the proceedings and suffered no language or comprehension difficulty.

A sentence of ten (10) years' imprisonment on each count, to run concurrently, was then imposed.

POINT I

THE COURT HAVING BEEN APPRISED OF A JUROR'S PREJUDICE AND BIAS, ITS FAILURE TO GRANT THE APPELLANT'S MOTION FOR A MISTRIAL CONSTITUTED REVERSIBLE ERROR.

At the outset of the trial the jury was directed not to discuss the case amongst themselves or with anyone else (S.M. 15). This admonition was repeated at the close of every court day (S.M. 91, 193-4), yet during the course of its deliberations, Juror 2 while in the courthouse elevator spoke to the clerk inquiring as to whether he could ask him a question. The clerk responded in the negative and the juror replied that he wanted to discuss it and he would and did on the following morning write the judge (S.M. 276-7).

The court did not interrogate the juror. It summarily refused to excuse him unless counsel for the government and the appellant consented to proceed with a jury of eleven. The government stated that it had no objection, but the appellant's attorney stated: "At this time I would like to move for a mistrial." The Court forthwith denied the motion (S.M. 277).

It is submitted that under these circumstances the denial of the application for a mistrial constituted reversible error.

The appellant was statutorily entitled to trial by a jury of twelve. Under the Sixth Amendment to the United States

Constitution he was entitled to an impartial jury. Under fundamental due process he is entitled to a jury free of bias and prejudice as well as one heedful of the court's mandate to have no outside contacts. When a juror, during deliberation, writes to the judge informing him of his prejudice, bias and extreme doubt against the defendant, he obviously is unfit for further service. For not only has he violated his oath but the court failed to comply with its pivotal and continuing duty that a verdict be rendered only by an impartial jury.

The Court's declaration that it had no intention of excusing the faithless juror and that he would continue to serve, unless both sides agreed to proceed with a jury of eleven was an ultimatum of draconic severity and afforded the appellant no choice whatever save that of consent.

Undaunted the appellant's attorney did move for a mistrial. Such application constituted a clarion declaration, timely and with specificity that the appellant not only did not want juror 2 to serve, but that he also did not want a jury of eleven. Indeed that he did in fact seek what he said he did, i.e., a mistrial.

Under those circumstances where the appellant had timely and cogently presented his position, what else was he to do but consent to a jury of eleven? He could have risked the ire of the Court by saying that it was committing an error of such fundamental

dimension that he would refuse further participation in the trial. The trial would then no doubt have proceeded without him and at no gain to the appellant. However, mindful always of his fundamental duty to the client, having already twice protected the record, and cognizant that the jury was still so divided that the Court would shortly give its version of an Allen charge, the appellant consented to a removal of juror no. 2. Indeed if he did not consent the prejudiced juror would have returned to the jury room and further contaminated the jury's deliberations.

In short, he was walking on both sides of the street. But he had been put there by the Court. By giving his consent the appellant did not withdraw or vitiate his prior application for a mistrial. It remained quiesent, to be as now, stridently set forth on appeal. To contend, as did the government in opposing a subsequent application to set aside the verdict, that the motion for a mistrial was naught but pro forma, overlooks the trial significance of a motion for a mistrial. In light of the appellant's plight, after the Court had already told him that the juror remains or else there be a jury of eleven, what else could the appellant do but consent? It was certainly not a voluntary waiver of the basic constitutional right to trial by an impartial jury.

The District Court in denying the appellant's motion to set aside the verdict did so in reliance upon this Court's holding in

United States v. Vega, 447 F. 2d 698 (2nd Cir. 1971), cert. denied 404 U.S. 1038 (1972). It is submitted that the holding therein is inapposite. Fundamentally there was a totally dissimilar fact pattern for in that case there was a "hold out juror". But no one knew who he was holding out for. There did not exist as here a juror admittedly prejudiced as against the appellant. Indeed, the Court therein specifically set forth that its decision was predicated upon the facts of that case. Supra, p. 701.

It is axiomatic that the difference between a holdout juror and a prejudiced juror is one who listens but cannot join with the majority and one who will not listen because from the depths of prejudice and bias he has ceased to be what the Sixth Amendment mandates, i.e., an impartial juror.

CONCLUSION

The Judgment Should Be Reversed.

Respectfully submitted,

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AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 28 day of June, 1974 at No. deponent served the within Brief upon Asst Attorn Foley Square. the Appellee herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me,
this 28 day of June 1974

Edward Bailey

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1975